

AUDITOR GENERAL'S REPORT

Toronto Building Division: Conditional Permits

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TABLE OF CONTENTS

EXECUTIVE SUMMARY 1

BACKGROUND 7

REVIEW RESULTS 12

A. ELEVEN OF FIFTEEN SITES HAD CONDITIONAL PERMITS THAT APPEAR TO HAVE BEEN ISSUED PREMATURELY 12

 A.1. Conditions for Issuing Conditional Permits Were Not Met..... 16

 A.2. Need for a More Thorough Conditional Permit Application Review Process 23

B. CONDITIONAL PERMIT APPLICATIONS ARE ENCOURAGED AND EXPEDITED 28

 B.1. Developers Are Invited to Apply for Conditional Permits Prior to Scheduled Increases in Development Charges Rates 29

 B.2. Some Key Staff Performance Appraisals Cite Facilitating Reduced Development Charges as an Accomplishment..... 31

C. MONITORING AND ENFORCEMENT OF CONDITIONAL PERMIT CONDITIONS AND REGULATIONS NEEDS IMPROVEMENT 32

 C.1. Monitoring of Site Construction Should Be Strengthened 32

 C.2. Inadequate Enforcement of Conditional Permit Agreement Requirements ... 34

 C.3. Parkland Levies and Education Development Charges Not Collected at the Time They Were Due 35

D. SCOPE LIMITATIONS 37

CONCLUSION 38

Exhibit 1: Conditional Permits Issued Prematurely 40

Exhibit 2: Applicable Law – Conditional Permits 42

APPENDIX 1: Management’s Response to the Auditor General’s Report Entitled: “Toronto Building Division: Conditional Permits” 43

EXECUTIVE SUMMARY

Review launched in response to a complaint received by the Fraud and Waste Hotline

In early 2017, the Auditor General launched a review in response to a complaint received by the Fraud and Waste Hotline. It was alleged that:

- there was a financial incentive for conditional permit applicants to obtain above-grade conditional permits in advance of scheduled development charges increases, and
- some above-grade conditional permits were not issued in full compliance with section 8(3) of the *Building Code Act*.

Allegations are substantiated

In our opinion, both allegations are substantiated. While the investigation into the complaint identified issues in a sample of conditional permits issued between 2012 and 2016, the intent of this report is to provide recommendations to strengthen Toronto Building's processes for issuing and monitoring conditional permits going forward.

The appropriate development charges were collected based on the conditional permit policy in effect at that time. On a go-forward basis we are recommending that the draft conditional permit issuance criteria be reviewed and finalized to provide a standardized approach and some objective measures to support the Chief Building Official in forming her opinion regarding conditional permit issuance.

Conditional permits are a tool to allow construction to proceed where outstanding issues prevent the issuance of a full building permit

The purpose of a conditional permit is to allow for construction to proceed even though there may be outstanding issues preventing the issuance of a full building permit. A conditional permit is one tool used in the development review process to balance the significant number of large complex development applications being received by the City. Aside from the conditional permit agreement, there is often a subsequent development application process such as condominium or severance approval that provides a backup in ensuring that matters of interest to the City are secured and fulfilled.

Requirements for issuing a conditional permit under the *Building Code Act*

The *Building Code Act* allows for the issuance of a conditional permit at the discretion of the Chief Building Official, but three conditions need to be met:

1. The project meets zoning and some specific environmental, heritage and other regulations, (referred to as "applicable law" – see Exhibit 2 – Applicable Law – Conditional Permits)
2. The Chief Building Official is of the opinion that unreasonable delays in the construction would occur if a permit was not issued
3. The applicant enters into a CP agreement with the City that sets out the timelines within which they must comply with the remainder of requirements for a building permit, including how and if the site must be restored should those requirements not be met.

Council delegated authority to the Chief Building Official to enter into conditional permit agreements

In 2002, City Council granted the Chief Building Official authority to enter into Conditional Permit Agreements to outline the conditions under which the permit is issued. These agreements allow construction to move forward while protecting the City's interest.

Conditional permits can be issued at the Chief Building Official's discretion

The *Building Code Act* provisions relating to conditional permits is broadly worded so that Chief Building Officials, with their experience and expertise, can review a proposed construction project and decide whether it will be unreasonably delayed if a conditional permit is not issued. The Chief Building Official is under no obligation to issue a conditional permit and the permit applicant has no right of appeal should a conditional permit not be issued.

Guidelines that would help to ensure all developers are treated consistently and fairly have not yet been finalized

In mid-2016, Toronto Building developed guidelines for issuing conditional permits. These guidelines can help to ensure that all developers are treated consistently and fairly because they provide objective criteria for determining the appropriate timing for issuing conditional permits. The guidelines are still in draft form and were not in use during the period covered by our review. The guidelines should be finalized promptly.

In the absence of any other objective criteria in the *Building Code Act* and Toronto Building's own Conditional Permit Policy, we used the draft guidelines as the benchmark by which we evaluated a sample of conditional permits issued between 2012 and 2016.

Criteria are not intended to restrain the discretion of the Chief Building Official to act within the law

To be clear, by recommending the use of criteria, we are not intending to restrain the discretion of the Chief Building Official to act within the law. We are simply suggesting that, consistent with the principles of administrative fairness, more uniformity in the application of criteria will help to ensure a consistent and fair approach is followed in each case. Using criteria as a benchmark will help to ensure that similar cases will be treated in a similar way, unless, in the Chief Building Official's view and in her discretion, there is a compelling reason to deviate from the criteria.

Key Findings

Partial permits can be issued for various stages of construction – below and above-grade

Toronto Building allows for the issuance of partial permits to support planned construction phases and schedules on complex projects. Partial permits are typically issued for various stages of construction starting with below-grade permits moving on to above-grade permits as construction proceeds.

The first above-grade permit is a critical milestone – this is when significant fees and charges become due

The issuance of the first above-grade permit, conditional or otherwise, is a critical milestone. The date of issuance is when the amount of development charges is calculated and payable. This is also the date in which other fees and charges, like parkland levies and education development charges become due.

Conditions for Issuing Conditional Permits Were Not Met for 11 of 15 Files Reviewed

Some conditional permits were issued prematurely based on the Division's draft criteria

Based on the draft conditional permit issuance criteria, we noted situations where, in our opinion, the above-grade conditional permits appear to have been issued prematurely. We selected 15 building sites for review across all four districts and 5 managers, with 10 of the items being selected from the South District which had the most construction activity. In 11 cases, the issuing of the conditional permits is contrary to the law, (two cases), and/or contrary to Toronto Building's draft criteria, (10 cases). More specifically, for these 11 sites, conditional permits were issued even though one or more of the following conditions existed:

- In 2 files, zoning deficiencies were outstanding and unresolved. Under provincial law, the Chief Building Official is not authorized to issue a conditional building permit when the proper zoning is not in place, (other than some minor exceptions which were not present in these cases).
- In 1 file, Building Code deficiencies were not resolved prior to the conditional permit being issued, contrary to Divisional requirements.
- 10 of these large-scale projects were not clearly in danger of construction delays without the permit, based on the time it took for construction to proceed to above grade.
- 5 of the sites had above-grade conditional permit agreements specifically prohibiting below-grade construction until conditions were met thus preventing above-grade construction from also proceeding.
- In 4 of the sites examined, demolition permits had not yet been issued for existing structures thus preventing above-grade construction from proceeding.

Further, we noted that in 8 of these files, Toronto Building did not follow its typical phased, staged, or partial permitting process and issued above-grade conditional permits either without, or within a few days of below-grade conditional permits. As a result, it appears the conditional above-grade permits were issued earlier than was typical.

DC revenues were \$8.0 million lower than when draft criteria are applied to the 15 conditional permits we reviewed

In the sample of files we reviewed, the issuing of conditional permits without using criteria such as those included in the draft guidelines resulted in the City's development charges revenue being reduced by approximately \$8.0 million on 11 development sites. For the 15 sites we reviewed \$29.9 million in development charges was received rather than \$37.9 million. We cannot project this reduction in revenue across the entire population, and we are unable to make any conclusions as to potential issues with CPs we did not examine. However, we can say that as a result of the frequency of the issues, the number of managers, and the focus on performance, this is a systemic issue and that potential reductions in DC revenues are much greater.

Processes for Approving and Monitoring Conditional Permits Can Be Improved

Need to strengthen processes to review applications and monitor conditional permits

A second theme identified in our review was a need to strengthen due diligence in approving and monitoring conditional permits to ensure compliance with section 8(3) of the *Building Code Act* and relevant chapters of the *Municipal Code*. This is important because once a conditional permit is issued the primary enforcement action that can be taken where an applicant does not comply with the conditional permit agreement is to revoke the permit and, in extreme cases, require the applicant to restore the site to its original condition. This is considered a very serious step and the Division generally only uses it as a last resort. The following issues suggest that adequate due diligence was not performed before the conditional permits were issued:

- Not validating information provided by applicants to justify the need for the conditional permit
- Inadequately documenting why the conditional permit is needed
- Inadequately monitoring compliance with terms of agreements
- Inadequately enforcing non-compliance with agreements

Customer Service and Administrative Fairness Need to Be Balanced

Conditional permits are encouraged and processing of applications is expedited before development charges rate increases

A third theme identified in our review was a culture encouraging and expediting the processing of conditional permits immediately before a development charges rate increase. This was evidenced by:

- Identifying projects likely to be impacted by an imminent development charges increase
- Contacting developers to suggest they may wish to apply for a conditional permit
- Citing expedited issuance of conditional permits and saving developers on development charges as an accomplishment in performance appraisals

The Division is responsible for ensuring administrative fairness

Toronto Building needs to balance customer service with their responsibility to ensure administrative fairness and consistent treatment of all permit applicants.

In addition to the above, we noted two instances of non-compliance with the *Toronto Municipal Code* provisions relating to the collection of parkland levies, although it appears this non-compliance is almost unavoidable given the short turnaround time for the issue of conditional permits around development charges increase dates.

Findings and recommendations should be considered as part of the End-to-End Review of the Development Review Process

Finally, the City is in the process of conducting an, "End to End Review of the Development Review Process". The Review will focus on the processing of all types of applications from prior to application intake to Planning approval and follow up. The review will take into account interdivisional dependencies, who is involved, what is done, how it is done, what gaps in process or expertise exist, the expected timing to complete the task and how this information is tracked (accounted for). It would be helpful if the findings of our report were considered during the End to End Review.

Conclusion

This report contains 17 recommendations along with management's response to each recommendation. Management agrees with our recommendations and has identified a plan to implement them. Management further agrees that there are concerns raised in this report that need to be addressed. The implementation of policies that set some objective criteria for the issuance of conditional permits, the equitable treatment of applicants and the strengthening of the monitoring and enforcement of conditional permit agreements will address these concerns.

The implementation of the recommendations will help strengthen controls over conditional permit issuance, increase development related revenues and ensure fairness for all applicants.

BACKGROUND

Review launched in response to a complaint received by the Fraud and Waste Hotline

The Complaint

In early 2017, as a result of a complaint received by the Fraud and Waste Hotline, the Auditor General began a review of the Toronto Building Division's process for issuing conditional building permits. The complaint had two allegations. The first was that there is a financial incentive for conditional permit applicants to obtain above-grade conditional permits in advance of scheduled development charges increases. The second allegation was that some conditional permits are not being issued in full compliance with section 8(3) of the *Building Code Act*. A consequence is that development charges are being determined at the rate applicable at the time the conditional permit is issued. As a result, the City is losing out on development charges revenues in cases where the conditional permit is not appropriately issued.

Conditional Permits

As background, where a landowner wants to construct a building they must apply for and obtain a building permit from the City. Once a permit applicant has met all of the conditions of the *Building Code Act*, the Chief Building Official must issue the requested permit.

Conditional permits can be issued at the Chief Building Official's discretion

In contrast, and in recognition of the complexities of complying with the requirements of the *Building Code Act*, the *Act* allows the Chief Building Official, at her discretion, to issue a conditional permit (CP). This may be done when an applicant has not fulfilled all of the requirements for a full building permit, but is in compliance with a set of reduced requirements. Should the applicant subsequently not be able to fulfill all of the requirements for a full permit, they bear the full risk of restoring the site to its original condition.

CPs are a tool in the City's development process

CPs are a tool used in the overall development process to manage the significant number of large complex development applications in the City of Toronto. However, it is worth stressing that an applicant has no absolute right to receive a CP. Rather, issuing such a permit is at the discretion of the Chief Building Official and requires the applicant to enter into a CP agreement with the City. In 2002, City Council delegated its authority to enter into these agreements to the Chief Building Official and Deputy Chief Building Officials to expedite the building permit process while still ensuring that the City's interests are protected. Any conditions that the City may wish to put on the construction would be included in the CP agreement.

Different types of conditional building permits

A CP can be issued for all or part of the construction of a building. While CPs are not required to be issued in stages, Toronto Building has a longstanding practice in place to issue the type of CP relevant to the immediate construction needs of the permit applicant. This staged permitting process is used by Toronto Building, particularly for large complex construction, where an application is not eligible for the issuance of a full permit.

Staged conditional permitting helps to both prevent unreasonable delays in construction and protect the City's interests.

The staged process can result in the use of four different types of CPs:

- Shoring CP – The holder of this below-grade (meaning below ground level) CP can conduct site excavation and the associated shoring, (installing supports to ensure walls do not collapse during excavation)
- Foundation CP – The holder of this below-grade CP can conduct all below-grade structural construction, including shoring

- Structural CP – This above-grade (above ground) CP permits its holder to conduct all related structural work for the building, including shoring and foundation
- Building CP – This above-grade CP allows its holder to construct the entire building, including shoring, foundation and structure

In contrast to the staged permitting approach is what has been called a "maximum permit allowed" approach. Under this approach, an above-grade CP will be granted even if the applicant is not in a position to construct above grade.

Toronto Building has created draft CP criteria to guide, and ensure consistency in, their decision-making process. The increased objectivity of this draft criteria will help to ensure all applicants are treated fairly. The maximum permit approach is inconsistent with the Division's staged permitting approach and its draft CP issuance guidelines. Further, using two different approaches could lead to claims of inconsistent treatment for projects and could be seen as unfair by permit applicants.

Development Charges

Development charges pay for growth-related infrastructure

Development charges (DCs) are charges imposed on land development and redevelopment projects and paid by the developer. We understand that in some cases all, or a portion, of these charges are passed on to the ultimate purchaser of residential units.

DCs help pay for infrastructure needed to service growth. This includes costs for roads, transit, parks, recreation, and water infrastructure related to development. Where collective DC revenues are insufficient to fund the growth-related infrastructure needs, the necessary funds need to be collected from other sources, including from taxpayers across the City through an increase in property taxes.

Growth pays for growth

By-Law No. 1347-2013 states that City Council “desires to ensure that the capital cost of meeting development related demands for, or the burden on, City services does not place an undue financial burden on the City or its existing taxpayers.” In numerous staff reports, this is stated more simply as the principle that "growth pays for growth."

\$702 million in development charges collected over the past four years

Development charges represent a significant source of revenue for the City. Over \$702 million in DCs have been collected over the past four years. The 15 files that we reviewed had a total of \$29.9 million in DCs.

DC rates are reviewed every five years

The *Development Charges Act* requires that the City, at a minimum of every five years, conduct a comprehensive DC background study. The study helps to forecast the City’s future growth-related infrastructure needs and related costs so that the City can set DC rates appropriately.

A significant DC rate increase was phased-in over two years

The most recent background study was completed in 2013. Following extensive consultation with industry stakeholders, City Council approved a 71 per cent increase to DCs imposed on residential developments. The DC increase was phased in over two years as follows:

Feb 1, 2014	32%
Aug 1, 2014	23%
Feb 1, 2015	15%
Aug 1, 2015	15%
Feb 1, 2016	15%

These increases are debated and approved in public and once approved by Council, effective dates and rates are published on the City's website.

City currently reviewing the DC By-law

The City is currently conducting a review of its DC By-law. The new By-law, including any proposed changes to DC rates and the timing for when DCs become due, is expected to be presented to City Council in early 2018.

DCs are due when the first above-grade permit is issued

Under section 415-8 of the *Toronto Municipal Code*, DCs are to be calculated, payable and collected as of the date the first above-grade permit is issued unless there is an agreement setting out a different timing for the payment.

Relationship between Conditional Permits and Development Charges

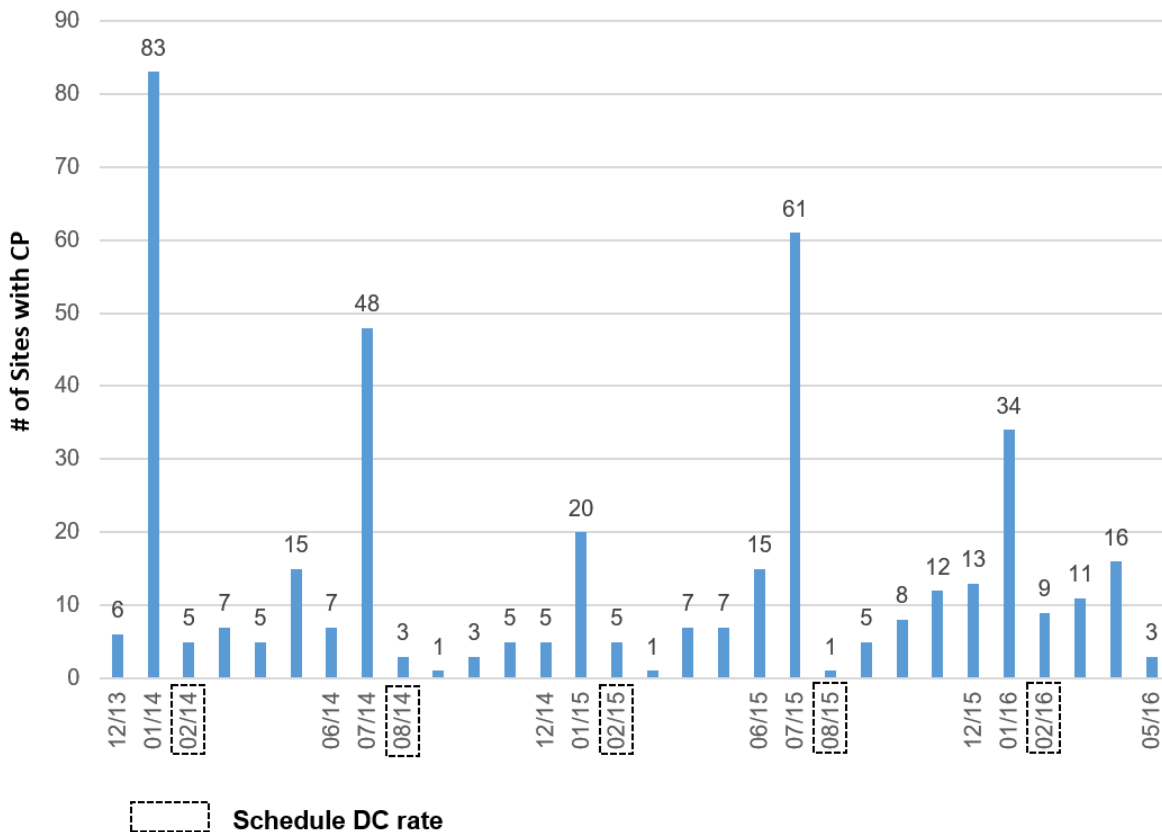
Incurring lower DCs can be a motivator for a developer to apply for a CP before a DC increase

Developers can save a lot of money by obtaining an above-grade building permit as early as possible to avoid paying higher DC rates. Therefore, if the developer is unable to fulfill all of the requirements necessary to obtain a normal above-grade building permit, there can be a significant financial incentive to apply for an above-grade CP in advance of a scheduled DC rate increase. As an example, DCs collected for one development was \$5.8 million on July 30, 2015. Had a CP not been issued, the DCs due would have increased by almost \$1 million just two days later when a DC rate increase was phased-in.

CP applications spike immediately before a DC rate increase

Given the potentially significant impact on the costs of development, a large number of CP applications are received immediately before a DC rate increase. This is illustrated in Chart 1.

Chart 1: Number of Sites with CP Applications Approved by Month (December 2013- May 2016)



CPs are issued to prevent unreasonable delays in construction from occurring. Expediting the processing of CP applications before a DC increase date has come to be expected by applicants.

In 2014 and 2015 DCs were \$83 million lower than they would have been without the CPs issued 30 days before a DC increase

Toronto Building provided us with their analysis of major projects that were issued an above-grade CP before DC rate increases in 2014 and 2015. Their analysis shows that DC revenues were \$83 million lower as a result of CPs issued 30 days before a DC increase. Of this amount, \$77 million (92 per cent) related to CPs issued 7 days before a DC increase. It should be noted that these DCs were collected in accordance with the DC rate in effect at the time the CP was issued.

REVIEW RESULTS

A. ELEVEN OF FIFTEEN SITES HAD CONDITIONAL PERMITS THAT APPEAR TO HAVE BEEN ISSUED PREMATURELY

It is important that all applicants be treated fairly and consistently while also protecting the City's interest

The issuance of CPs to applicants meeting all the requirements for a CP is appropriate.

What is of concern are situations where the City's interests are not adequately protected. This can occur when above-grade CPs are issued without meeting all regulatory conditions and divisional guidelines. It is also important that all applicants be treated fairly.

Our opinion that CPs were issued prematurely is based on draft criteria developed by the Division in mid-2016

In our opinion, it appears that CPs were issued prematurely in 11 of 15 sites we reviewed. Our sample of 15 projects was taken primarily from the CPs issued 7 days before a DC increase. We selected 15 building sites for review across all four districts and 5 managers, with 10 of the items being selected from the South District which had the most construction activity.

In forming this opinion, we used objective criteria developed by the Division, although still in draft form. These criteria were not included in the CP policy in force during the period we reviewed; however, they were used in our analysis as the policy in force at the time did not contain objective criteria.

Criteria for Evaluating Whether Conditional Permits Should be Issued

Chief Building Official has complete discretion in determining if CPs should be issued

According to section 8(3) of the *Building Code Act*, a CP may be issued when the following three conditions are met:

1. The project meets zoning and some specific environmental, heritage and other regulations, (referred to as "applicable law" – see Exhibit 2 – Applicable Law – Conditional Permits)
2. The Chief Building Official is of the opinion that unreasonable delays in the construction would occur if a permit was not issued
3. The applicant enters into a CP agreement with the City that sets out the timelines within which they must comply with the remainder of requirements for a building permit, including how and if the site must be restored should those requirements not be met

The Chief Building Official is under no obligation to issue a CP. Doing so is fully at her discretion and, should a CP not be issued, there is no right to appeal that decision.

Existing Conditional Permit Policy does not contain objective criteria for permit issuance

Although there is an existing Conditional Permit Policy, it is general in nature and silent on objective criteria guiding the issuance of above-grade CPs. We were surprised to find that CP issuance criteria with objective, verifiable guidelines were only prepared in mid-2016 and were still in draft form at the time of our review.

Draft criteria provided to Deputy City Manager in a Briefing Note

With respect to the draft CP criteria, we were repeatedly advised that it was unfair to review CPs issued using these criteria. However, in a March 2017 Briefing Note to the Deputy City Manager, the Chief Building Official attached as "Attachment A" the "draft" criteria we were given. In discussing the procedures and protocols for CPs established after the 2002 delegation of authority noted above, the briefing note included the following comment:

Reading the Briefing Note could lead one to conclude that the draft criteria were being used

"These original procedures have been enhanced over time leading up to the practices recently reviewed through the interdivisional task team (Developing Toronto). The steps reviewed by Toronto Building in consultation with other divisions before a conditional permit is issued are attached as Appendix A"

These comments suggest that the steps outlined in the "draft" criteria are in fact being used by the Division.

Timing of issuing CPs can impact the amount of DCs due

In some cases, there is evidence to support that CPs were issued primarily to avoid DCs rate increases.

For example, on one project, a 34 storey condominium building with three levels of underground parking, (item F in Table 1), both below and above-grade CPs were issued for the site within 10 days before a development charges (DC) rate increase in February 2013. A Toronto Building staff member involved in reviewing the CP application stated:

"To avoid the increase in DC: I signed off on the Shoring CP on January 20, and I signed off on the Foundation & Structural CPs on January 30, two days before a 17 percent DC rate increase."

Approximately, \$427,000 in DCs revenue was lost on this project alone as a result of the apparent premature issuance of the CP. We considered this issuance to be premature since it was a full eight months later before the project reached the P1 level, the level at which Toronto Building's draft criteria suggest it would be appropriate to issue an above-grade CP.

DCs were collected according to the policy at the time

The appropriate DCs were collected based on the CP policy in effect at that time. On a go-forward basis we are recommending that the draft CP issuance criteria be reviewed and finalized to provide a standardized approach and some objective measures to support the Chief Building Official in forming her opinion regarding CP issuance.

This section of the report includes further examples where CPs were issued even though it appears the requirements under section 8(3) of the *Building Code Act*, or draft CP criteria were not met.

Table 1 below is an extract of information included in Exhibit 1 at the end of our report. The table shows several things for 11 of the 15 projects we reviewed:

1. The CPs were issued immediately before a DC increase.
2. For most, a significant time lapse from when the permits were issued to the time that an above-grade CP should have been issued applying the criteria in Toronto Building Division's draft CP criteria. The lapsed times suggest that there was no unreasonable delay requiring the issue of the CPs.
3. The difference in the amount of DC revenue that could have been collected by the City had the CP been issued according to the draft criteria. It should be noted that the DCs on the projects we reviewed were collected in accordance with the DC rate in effect at the time the CP was issued.

DC revenues were \$8.0 million lower than when draft criteria are applied to the 15 CPs we reviewed

However, in each case, by obtaining an above-grade CP, the permit holder benefited financially from lower DCs. We conservatively estimate the City's DC revenues from these samples alone, were \$8.0 million lower than they would have been had the permits been issued in accordance with Toronto Buildings draft CP criteria. We cannot project this reduction in revenue across the entire population, and we are unable to make any conclusions as to potential issues with CPs we did not examine. However, we can say that as a result of the frequency of the issues, the number of managers and the focus on performance, that this is a systemic issue and that potential reductions in DC revenues are much greater.

Table 1: Information Related to Conditional Permits Reviewed

	Date CP Issued	No. of Days Before a DC Rate Increase	Status of Above-Grade Construction	DC Revenue Reduction (in \$)
A	Jan 29, 2015	3 days (Feb 1, 2015)	13 months later before excavation was complete	\$3,000,000
B	Jul 30, 2015	2 days (Aug 1, 2015)	16 months later, below-grade shoring was still in progress	\$1,600,000
C	Jan/31/2014	1 day (Feb 1, 2014)	31 months later, shoring and excavation was completed	\$900,000
D	Jan 31, 2012	1 day (Feb 1, 2012)	6 months later, worked on P1 level	\$500,000
E	Jan 27, 2014	5 days (Feb 1, 2014)	19 months later, worked on P1 level	\$500,000
F	Jan 30, 2013	2 days (Feb 1, 2013)	8 months later, worked on P1 level	\$400,000
G	Jul 31, 2015 & Jan 30, 2016	1 day (Aug 1, 2015) & 2 days (Feb 1, 2016)	As of July 2017, no above-grade work has started. This was a project with two phases	\$400,000
H	Jan 30, 2015	1 day (Feb 1, 2015)	Almost 14 months later before excavation was complete	\$300,000
I	Jan/29/2016	3 days (Feb, 2016)	CPs were issued before the collection of DC	\$200,000
J	Jan 30, 2014	2 days (Feb 1, 2014)	6 months later, underground parking was only constructed to P2 level	\$200,000
K	Jul 31, 2014	1 day (Aug 1, 2014)	No construction activity for two years. The CP was subsequently revoked	\$0 ¹
Total Estimated Loss in DC Revenue				<u>\$8,000,000</u>

¹Since the CP was revoked no DC loss is attributed here. Had the project continued, we estimate lost DCs of \$70,000, (one DC increase)

A.1. Conditions for Issuing Conditional Permits Were Not Met

Two Instances of Non-Compliance with Zoning and/or Building Code Act

Under the law, CPs should not be issued where certain defined outstanding zoning deficiencies exist

One of the three requirements under subsection 8(3) of the *Building Code Act* is compliance with zoning bylaws passed under Section 34 and 38 of the *Planning Act*. Under the law, the Chief Building Official cannot issue CPs with outstanding zoning deficiencies, (other than certain defined deficiencies that were not present in the files we reviewed).

Two projects did not have proper zoning and should not have received CPs under the *Building Code Act*

In our examination of 15 sites, two projects did not have proper zoning in place.

For one project, (item D in Table 1), a CP was issued for a large residential building where City Council had placed a hold on development of the site, meaning zoning changes were not allowed without the express approval of City Council. Toronto Building staff held the view that because a report recommending lifting the hold was on a Community Council meeting agenda on February 14, 2012, there was sufficient basis to issue a CP on January 31, 2012, one day before a DC rate increase of approximately 20 per cent. In essence, staff acted on the assumption that a particular recommendation would be adopted by City Council. The premature issuance of the CP was not compliant with the Act and resulted in a loss of just under \$0.5 million in DC revenue.

For the second site, (item G in Table 1), CPs for a project that included 49 structures were issued one day before a DC rate increase. The site had several zoning deficiencies. Again, the Act states that the Chief Building Official cannot issue CPs with outstanding zoning deficiencies. The premature issuance of the CP was not compliant with the Act and resulted in a loss of just under \$0.4 million in DC revenue.

A CP was issued without completing Building Code review

We also noted that the Building Code review that was normal practice at the time, and confirmed by its inclusion in the draft guidelines Toronto Building has developed, was not completed.

Toronto Building staff responsible for this project advised us that there was no time for even a cursory review between the receipt of the drawings and the DC increase date. This individual advised us that, based on this, in their opinion, the CP should not have been issued. However, management, who initially agreed with the staff member, subsequently pushed through the CP application so that the CPs were issued before the DC rate increase.

Under management's direction, staff notified the applicant of two informal requirements related to addressing comments after a building code review was completed and obtaining the building examiner's approval prior to starting construction. The applicant accepted the conditions and the above-grade CPs were issued. These conditions were not included in the CP agreement, the binding legal document.

Conditional Permits Issued Without Evidence Demonstrating Unreasonable Delays in Construction Would Occur

CPs are issued to prevent future unreasonable delays in construction

One of the criteria for issuing a CP under Subsection 8(3) of the *Building Code Act* is that the Chief Building Official "*is of the opinion that unreasonable delays in the construction would occur if a conditional permit is not granted.*" This leaves significant discretion for the Chief Building Official as to whether or not to issue a CP. We have been advised by Toronto Building staff that the term "*unreasonable delays in the construction*" is not defined and particularly the term "construction" has been interpreted very broadly by the courts.

The *Building Code Act* leaves significant discretion to the Chief Building Official to determine whether to issue a CP

The Chief Building Official, with her experience and expertise, can review a proposed construction project and decide whether it will be unreasonably delayed if a CP is not issued. The broad provisions of the *Act* and the lack of definition for some key terms, make it even more important to have internal guidelines to ensure consistency in permit issuance decision making.

Existing policy does not describe how to determine whether unreasonable delays exist

The current Conditional Permit Policy requires Toronto Building staff to evaluate whether claims of future unreasonable delays are justified. The Policy does not include detailed guidelines to assist in determining whether a CP should be issued.

Draft guidelines developed in mid-2016 contain objective criteria

However, the draft criteria for issuing above-grade CPs includes the requirement that, "*Site construction must be at parking level 1 and in a construction position to proceed above grade*". Essentially, the builder should be ready to begin above-grade construction if they are requesting an above-grade CP.

Construction must start within 20 business days according to the majority of CP Agreements we reviewed

Where above-grade construction does not start within a reasonably short time, it would appear that there was no unreasonable delay and therefore there was no real need to issue the CP. The standard CP agreement includes a condition that construction seriously begin within 20 business days. This is a standard clause for consistent treatment of permit applicants and to ensure applicants were in urgent need of a CP to prevent unreasonable delays. Toronto Building staff maintain that this 20 day criterion is not necessarily reasonable, however it is a condition in the CP agreements we reviewed that were signed by the Chief Building Official or Deputy Chief Building Official.

CPs issued where construction unlikely to have been delayed

During our review, we identified ten projects where above-grade CPs appear to have been issued prematurely based on the draft CP criteria. There are three main indicators that it was unlikely that above-grade construction was probable in the near term and that there would have been unreasonable delays if a CP was not granted:

1. Above-grade CPs were issued prior to below-grade construction being completed to a level where above-grade construction was probable in the near term.
2. Above-grade CP agreements included conditions that had to be satisfied before below-grade construction could begin.
3. CPs to replace buildings were issued before demolition permits were issued for existing buildings on the site.

Indicator 1: Above-grade CPs were issued prior to completion of below-grade work to a point where above-grade construction was probable in the near term

Ten projects in our sample had above-grade CPs granted prior to below-grade construction being completed to a level where above-grade construction was probable in the near term or, as stated in the draft criteria, *"in a construction position to proceed above grade"*. As indicated in Exhibit 1, all of these CPs were issued one to five days before a scheduled DC rate increase.

CPs issued where project had not reached parking level one and in a construction to proceed above grade

These CPs appear to have been prematurely issued based on our review and applying the draft CP issuance criteria. In nine cases, the sites included underground parking garages that were not yet constructed. In all of these cases, it took six or more months for construction to reach the P1 parking level, the point where above-grade construction might be able to start within a very short timeframe. This is also, coincidentally, the point where Toronto Building's draft permit issuance guidelines indicate it is appropriate to issue a conditional above-grade permit. In one case, (sample item C in Exhibit 1), it took more than two and a half years before the completion of shoring and excavation, let alone construction of underground parking.

Indicator 2: Above-grade CP agreements included conditions that prevented below-grade construction

CPs issued where agreements prohibit below-grade construction

Five projects in our sample had a CP agreement which prohibited below-grade construction until certain issues were resolved. We compared the stage of construction of these projects to the draft CP criteria. It is our view that it is unlikely that there were unnecessary delays in construction as evidenced by the status of construction at the time the CP was issued and the length of time it took to complete necessary below-grade work as noted in Exhibit 1.

For example, on one large 60-storey condominium project, (sample item A in Exhibit 1), the CP agreement prevented the developer from starting foundation work (i.e., below-grade) for 60 days following the issuance of the above-grade CP. We noted that two months after the CP agreement was issued, the condition was extended for another 120 days. Even after below-grade construction could commence, five levels of underground parking needed to be built before above-grade construction could start. We understand that, as a general rule of thumb, each level of underground parking takes approximately one month for excavation and one month for construction, or 10 months in the case of this project.

As indicated in Exhibit 1, all of these projects received an above-grade CP between one and three days before a scheduled DC increase.

Indicator 3: CPs to replace buildings were issued before demolition permits for existing buildings were issued

CPs for replacement buildings issued before related demolition permits

Four projects in our sample had above-grade CPs granted for replacement buildings where the permit for the demolition of an existing building had not yet been issued. None of these projects were in a position to proceed with above-grade construction when the above-grade CP was issued. As indicated in Exhibit 1, all the above-grade CPs were issued shortly before a scheduled DC rate increase.

A CP for replacement buildings was granted while existing residential buildings were still occupied

For one project, (sample item B in Exhibit 1), a number of above-grade CPs were granted one day before a DC rate increase even though existing buildings that needed to be demolished first were still occupied and residents were scheduled to move out two months later. The demolition permit was not issued until three and a half months after the above-ground CP was issued and construction activity was first reported nine months after CP issuance. An inspection report 16 months later noted that the construction was still at the excavation stage. In other words, 16 months later the builder was still not quite ready to begin above-grade construction.

In the City, in order to obtain a permit to demolish a residential building, there must be an issued building permit to construct replacement residential property. There is no requirement that the issued permit be for above-grade construction. Therefore, it would have been possible, following the typical staged permitting approach, to issue a below-grade CP. It appears there was no unreasonable delay in construction, requiring the issuance of the above-grade CP.

In support of the CP application, the developer indicated that one reason for requesting the CP was the financial impact of the upcoming DC rate increase.

The Conditional Permit Policy does not require that staff consider the status of any related demolition permit applications when determining whether unreasonable construction delays exist. The policy should be revised to ensure demolition permit status is considered.

Recommendations:

- 1. City Council request the Chief Building Official & Executive Director, Toronto Building Division to review and finalize draft conditional permit issuance criteria/guidelines.**
- 2. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to strengthen controls to ensure that all requirements, including Zoning By-Law, *Building Code Act*, and Toronto Building conditional permit issuance criteria, are met prior to the issuance of a conditional permit.**
- 3. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement a quality assurance and compliance process to ensure conditional building permits issued meet regulatory and divisional requirements.**
- 4. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to amend the Conditional Permit Policy to require that all conditions relating to a conditional permit be included in the formal agreement supporting the conditional permit and ensure that staff adhere to this requirement.**
- 5. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure that the impact of any development related demolition permits are considered prior to issuing a conditional permit.**

A.2. Need for a More Thorough Conditional Permit Application Review Process

Need to enhance controls over CP review

There are two stages where key controls should be designed and implemented to protect the City's interests. These are the front-end CP application review process and, once a CP is issued, the monitoring and enforcement of the CP agreement. The former reasonably prevents CPs from being inappropriately issued and the latter relies on the enforcement tool of permit revocation.

Strong controls over CP application reviews are critical so that the Division does not have to resort to CP revocation to ensure that the City's interests are protected.

Key controls should be implemented to improve the CP application review process

There are several key controls over the CP application review process that are needed to provide the City with reasonable degree of assurance that the Chief Building Official, in exercising her discretion to issue CPs, is complying with section 8(3) of the *Building Code Act*, relevant chapters of the *Municipal Code* and divisional CP issuance guidelines.

This section of our report discusses some of the key controls and steps that should be taken to improve CP application review procedures.

Documentation Should Be Retained to Support Decisions

Inadequate documentation retained to demonstrate the need for a CP

There is a lack of documentation supporting decisions to accept or reject CP applications. For the majority of CPs reviewed, we did not find documents demonstrating there would be unreasonable delays in construction if the CP was not issued. In most cases, where documentation exists, it is incomplete and does not include the developer's request for a CP or the evaluation of this request by the Division.

Under the *Building Code Act*, the Chief Building Official has authority to issue CPs subject to three criteria. One of those criteria is that the permit applicant enter into an agreement setting out the City's various conditions and timelines. The *Building Code Act* gives Council the authority to enter into such agreements.

Rationale for not following advice from other City Divisions was not documented

In exercising her discretion, the Chief Building Official consults with other divisions prior to issuing a CP. There was not always documentation on file to explain why the Division acted contrary to advice from other City Divisions. It would be prudent for Toronto Building to retain documentation to support a decision to not follow the advice of another Division, including Legal Services.

Non-standard CP agreement conditions were not explained

In addition, several CP agreements contain conditions that deviated from the standard CP agreement template. These conditions included prohibiting certain below-grade construction before specific conditions were met. While we did not find documentation supporting the reasons for these conditions, in some cases these were conditions requested by other City divisions.

Divisional policies do not specify documentation requirements

The Conditional Permit Policy does not include clear requirements for appropriate documentation in support of key decisions. Without sufficient documentation, the Division is unable to provide support for a decision if challenged.

Need for Stronger Verification Procedures on Claims There Will be Unreasonable Delays

No guidelines for determining whether unreasonable delays exist

The Conditional Permit Policy requires Toronto Building staff to evaluate whether claims of unreasonable delays are justified. However, there are no guidelines in place to facilitate such a complex task, making it difficult to ensure compliance, consistency, and fairness in the issuance of CPs.

Our discussions with management suggest that the decision to issue a CP is primarily based on information provided by the applicant. However, of the 15 files we reviewed, only four had a CP request from the applicant. The request is an important document as it is where the applicant documents the reasons that a CP is required to prevent unnecessary delays in construction. Three of the four requests we found cited a pending DC increase as one of their reasons for requesting a CP. For the other 11 files there was no documentation to support claims of unreasonable delays in construction.

Decisions to issue permits based on unverified statements by applicants

Accepting the claims of applicants, without adequate due diligence to allow the Chief Building Official to make an informed decision as to the veracity of claims of unreasonable delays increases the risk that CPs are being approved when they are not actually warranted. This is evident from the various examples identified during our review where above-grade CPs appear to have been issued prematurely when compared to the Division's draft CP issuance criteria.

Applicant statements need some verification

In our opinion, applying due diligence to assertions of CP applicants is necessary to support a decision to issue a CP.

Impact of High Demand for Permits Prior to Development Charge Rate Increases

Obtaining a building permit can be a lengthy process

Obtaining a building permit for a large complex building is a lengthy process with many levels of approvals required. Permit applications can be in process for some time. As applicants get closer to satisfying the conditions to receive a full building permit, they may be in a position to qualify for a CP. For the 15 sites we reviewed building permit applications were received in advance of the CP applications as follows:

Number of Permits	No. of Months Building Permit Applied for before CP Issued
6	2 – 3 months
5	4 – 8 months
5 ¹	9 – 25 months

¹Note that total is 16 permits as one site had two phases with separate CP issue dates for each phase

Surge in CP applications before a DC increase

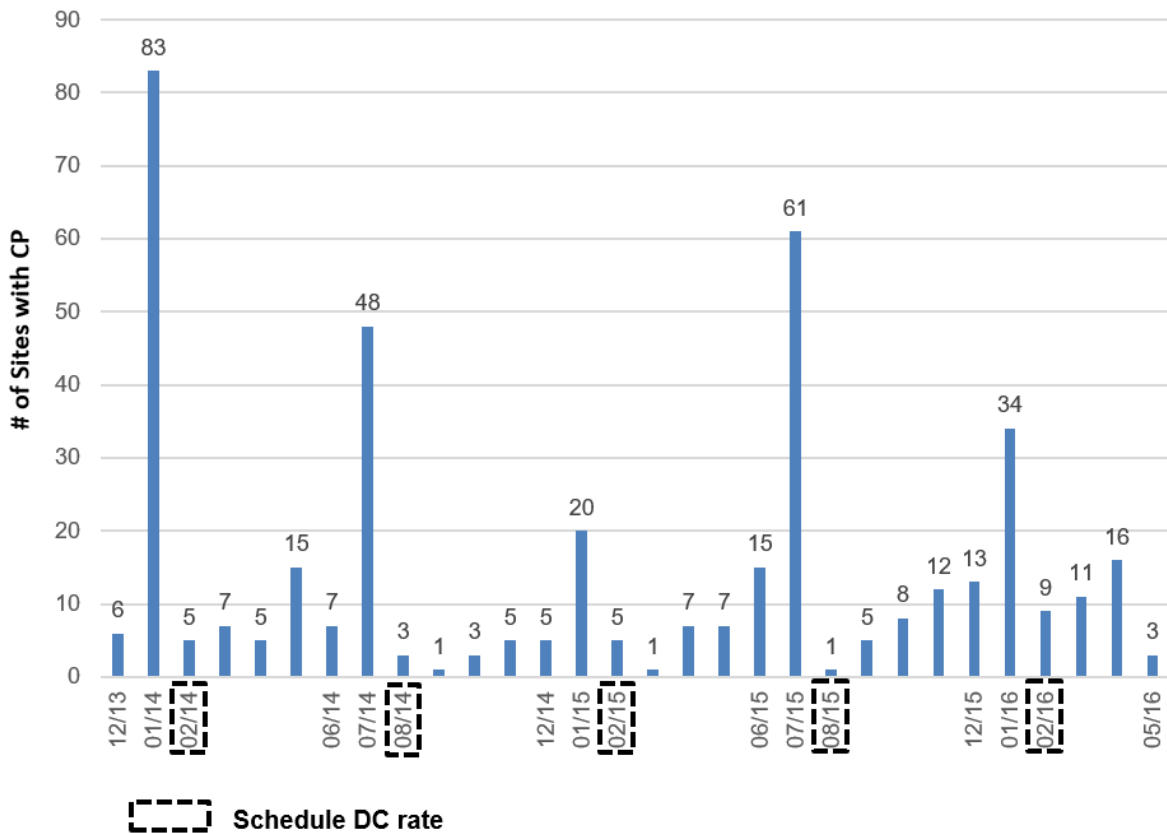
In the weeks leading up to a DC increase, there is a significant increase in the number of CPs requested and processed. In general, 70 per cent of all CPs processed during the period we reviewed, (October 2013 to September 2016) are processed within the 30 days before a DC increase. In dollar terms, DCs on CPs processed up to 30 days before a DC increase accounted for 57 per cent of the total DCs during the 36 month period we reviewed.

Time to process CP applications decreased significantly as the date of DC rate increases approached

We noted numerous instances where CP applications were submitted as little as one day before the DC increase date. We also noted that there was a drastic reduction in the time it took Toronto Building to review CPs. Some applications were approved on the same day they were received.

Chart 2 below, presented earlier in this report, is provided here again as a visual aid to the commentary in the preceding paragraph.

Chart 2: Number of Sites With CP Applications Approved by Month (December 2013 - May 2016)



Volume of work immediately prior to a DC rate increase can lead to short cuts and mistakes

The exceptional volumes of work during the peak period leaves staff with insufficient time to perform necessary due diligence. This in turn leads to short cuts where staff indicated there was no time to do even a cursory review of the merits of the permit. In addition, processing these permits the same day or in a short period of time may not allow for input from other City Divisions, if necessary.

Process Transparency and Accountability to Council

Significant increases in CP activity and impacts warrant some level of reporting to Council

In 2002, Council delegated authority to enter into CP agreements to the Chief Building Official and Deputy Chief Building Officials. At the time staff requested this delegated authority, it was estimated that there would be 30 to 40 CPs for the first year. Construction activity in the City has recently been at a level that sees Toronto Building issuing 500 to 600 CPs per year with construction values in the range of \$8 billion according to a 2013 report from Toronto Building.

<http://www.toronto.ca/legdocs/mmis/2013/pg/bgrd/backgroundfile-61207.pdf>

The foundation of open government is well-documented and accessible information to strengthen public trust that their interests are protected, and fairness is secured. To a certain degree, this should also apply to the issuance a CPs to allow, at a minimum, Council to gain assurance around the extent and impact of CPs being issued. Periodic reporting to Council could provide information on the timing, extent, magnitude and impact of CPs issued and also information supporting the need to issue the CPs.

Recommendations:

- 6. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to amend the Conditional Permits Policy to:**
 - a. include requirements for the retention of appropriate documentation in support of decisions related to the issuance of Conditional Permits**
 - b. ensure management scrutiny and approval of significant deviations from policy and standard practice are documented**
 - c. include guidelines to assist staff in making assessments of claims of unreasonable delays in construction.**

7. **City Council request the Chief Building Official & Executive Director, Toronto Building Division, to document the steps taken to obtain reasonable assurance that Conditional Permit applicants' assertions of unreasonable delays in construction are valid before approving the conditional permit application.**
8. **City Council request the Chief Building Official & Executive Director, Toronto Building Division, to examine alternatives to mitigate the risks caused by the volume of conditional permit applications submitted immediately prior to a development charges increase.**
9. **City Council request the Chief Building Official & Executive Director, Toronto Building Division to periodically report to Council providing information as to timing of conditional permits relative to changes in development charges, extent, and impact of conditional permits issued.**

B. CONDITIONAL PERMIT APPLICATIONS ARE ENCOURAGED AND EXPEDITED

The Chief Building Official, Deputy Chief Building Officials, and other senior staff of the Toronto Building Division influence the workplace attitudes towards CPs. Whatever tone management sets will likely have a trickle-down effect on staff within the Division.

Management believes City Council wants to reduce the impact of DCs on the development industry

Even though planned increases in DCs are needed to pay for the impact that new developments have on existing infrastructure, it is the view of Toronto Building management that past decisions of City Council indicate a desire to reduce the impact of DCs on the development industry to enhance development prospects for the City.

Toronto Building management provided several City Council decisions to support their view. In each case, it is our opinion that Council's decisions appear to respond to a particular unique circumstance. The noted Council decisions do not direct Toronto Building to reduce DC charges by issuing CPs nor do they indicate any other clear intent of Council to promote the early issuance of CPs in general.

The actions of management staff to promote the issuance of CPs before a DC increase would cascade down and impact the attitude and actions of other Toronto Building staff. This is evident in actions management and staff have taken to:

1. Invite developers to apply for CPs in order to avoid scheduled increases in DC rates.
2. Cite facilitating reduced DCs as an accomplishment on annual performance appraisals.

B.1. Developers Are Invited to Apply for Conditional Permits Prior to Scheduled Increases in Development Charges Rates

Systematic process to notify developers of a pending DC increase

During our review, we observed that developers that could be affected by a DC rate increase were notified by Toronto Building staff and invited to submit CP applications weeks before a DC increase. The process involved many levels of employees within the Division and consisted of:

- a. Creating a list of developers potentially affected by the DC increase
- b. Notifying the developers on the list of the pending increase either by email or phone
- c. Follow-up by Divisional management staff to ensure that a notification was indeed sent by staff

Examples of inviting CP applications

For example, one manager provided a list of projects to staff on December 12, 2012. The list contained 19 projects, only two of which were on the list, per the manager, "*for a different reason than to beat the pending DC increase*". A DC increase of 15 per cent was scheduled for February 1, 2013. The manager went further to require staff to "*make sure that the 17 applicants are informed of the increase.*"

Another example is from an email by a manager distributed to many employees on July 15, 2015. This email stated that

"This is at [sic] time again for a push to expedite building permits that can be issued prior to the end of July deadline, to avoid the DC increase. Please check your to-do list to identify any such application and make a push for it".

We note that this appears to be an ongoing method of operating because on January 11, 2016, one manager instructed his staff to provide "a list of projects that you anticipate will be affected by the DC increase at the end of this month". A 15 per cent phase-in of the increase in DCs was scheduled for February 1, 2016.

DC increases are well-known

It is unnecessary for staff to send reminder notices to industry participants and to invite above-grade CP applications in advance of a scheduled DC increase. The process to establish rates for DCs is rigorous and involves extensive consultation with the industry. The industry also provides input into the City Council's decision-making process by presenting their views at the Executive Committee when the relevant staff report is tabled. Consequently, the timing of DC increases are well-known and expected by the development industry. The scheduled increases, once approved by City Council, are also posted on the City's website.

Encouraging applicants to submit CP applications is unnecessary

Therefore, the push to encourage applicants to submit CP applications is unnecessary. If applicants were in fact experiencing unreasonable delays they would apply for a CP and present the relevant information to Toronto Building without needing to be prompted.

Administrative fairness

As a customer service, prior to a DC increase, the Division reviews files in process. Based on their experience and knowledge of the files, staff send a notice to the applicants they deem may be in a position to receive a CP. However, selectively notifying applicants of the impact of DC increases may be perceived as being unfair by applicants that do not receive any notification.

Recommendation:

- 10. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure building permit applicants are treated fairly and consistently by either:**
 - a. instructing staff to stop inviting conditional permit applications, or**
 - b. providing all applicants with building permit applications in process that will be subject to development charges with information regarding applying for a conditional permit prior to a development charges increase.**

B.2. Some Key Staff Performance Appraisals Cite Facilitating Reduced Development Charges as an Accomplishment

Issuing CPs to lower DCs was identified an achievement

We became aware that annual performance appraisals of some management staff identified processing of CPs before a DC increase as an achievement. The achievement appears to be measured by the number of CPs issued and the amount of DC savings received by permit holders.

For example, one Performance Plan noted that "*In January and in July 2014, processed a total of 70 conditional permits so that construction could commence in a timely manner and without increased financial burden to developers.*" The 71 per cent increase in residential DCs was phased-in on February 1 (32%) and August 1 (23%) of 2014.

In another Performance Plan, one achievement listed was that a total of 36 CPs were issued before the end of July 2015 "*to save developers on the DC increase.*" On August 1, 2015, there was a phase-in of 15 per cent of the DC increase.

In addition, employees were complimented by managers for rushing CPs through before the DC increase deadline.

Recognition is given for reducing DCs

A more appropriate objective would be success in issuing CPs to ensure developments meeting all regulatory requirements are not unreasonably delayed. If staff believe their performance will be favourably impacted by reducing DCs for developers, then their actions may differ from those they would take if they were trying to provide an efficient service to ensure construction is not delayed in addition to protecting the City's interests. Some of the exceptions discussed in Section A and the comments noted in performance planners would appear to indicate that staff are motivated by the former rather than the latter.

Recommendations:

- 11. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure performance planning objectives for individual employees contribute to the overall efficiency and regulatory compliance of the City.**
- 12. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure staff are aware and trained in appropriate divisional objectives that should guide their day-to-day activities and decisions.**

C. MONITORING AND ENFORCEMENT OF CONDITIONAL PERMIT CONDITIONS AND REGULATIONS NEEDS IMPROVEMENT

C.1. Monitoring of Site Construction Should Be Strengthened

Enhanced monitoring will lead to higher degree of compliance

Conditional permit agreements usually spell out a number of conditions that must be fulfilled within specified timeframes. Moreover, a standard condition included in CP agreements is that failure to comply with one or more conditions under the CP agreement may result in revocation of the permit. To be effective, there must be sufficient, timely monitoring of the conditions set out in the CP agreement.

Building inspection processes do not sufficiently address unique CP risks

During our review, we noted a number of instances where the conditions of CP agreements were not satisfied. Standard building permit inspection processes and procedures do not sufficiently address the varying conditions included in CP agreements.

For example, the standard CP agreement condition for construction to start within 20 days was not always coupled with a corresponding building inspection at the 20-day mark. A 20-day inspection was not conducted on nine sites in our sample.

Technology may enhance operational efficiencies

Enhanced CP-specific monitoring procedures will inevitably increase the demands on site inspectors. However, there are some ways to reduce the need for physical site visits. For example, permit holders can be required to submit photos so that follow-up on the status can be reviewed on a sample basis. Alternatively, by using online technology, non-value added activities such as travel time could be minimized.

City currently conducting an end-to-end review of the development application process

On a broader scale, the City is in the process of conducting an, "End to End Review of the Development Review Process". The Review will focus on the processing of all types of applications from prior to application intake to Planning approval and follow up. The review will take into account interdivisional dependencies, who is involved, what is done, how it is done, what gaps in process or expertise exist, the expected timing to complete the task and how this information is tracked (accounted for).

Conditional permits, as a tool in the development process, would be one element of this broader review.

The Review is being conducted by a Working Group chaired by the City's Chief Transformation Officer and expects to report to Planning and Growth Management Committee in April 2018.

In general, periodic reviews of processes and procedures can be useful in identifying changes in industry practices and potential impacts of economically feasible technological advancements. Identifying and implementing those that are appropriate will help to keep City operations up to date, efficient, and cost effective.

Recommendations:

13. **City Council request the Chief Building Official & Executive Director, Toronto Building Division, to review permit monitoring and enforcement practices and undertake any changes necessary to adequately monitor Conditional Permits.**
14. **City Council request the Chief Building Official & Executive Director, Toronto Building Division, to explore opportunities to enhance the use of technology in the inspection process in an effort to gain both efficiency and effectiveness.**

C.2. Inadequate Enforcement of Conditional Permit Agreement Requirements

Non-compliance with terms of the CP agreement

Construction under a CP is governed by two key documents: the permit and the CP agreement. The permit allows the holder to construct to the stage specified by the permit and the agreement contains provisions requiring the permit holder to perform certain tasks within a specified time frame.

In the files we reviewed there was significant non-compliance with terms of agreements. In many cases the agreements, which are generally valid for six months, were extended another six months and in one case the agreement was renewed six times.

In one file (sample item G in Table 1), delays in project construction led Toronto Building staff to consider revoking the CPs in February 2016. The above-grade CPs were issued for phase 1 in July 2015 and for phase 2 in January 2016. One reason suggested for revoking the CPS was that the applicant had provided false information to obtain the CPs. A revocation letter was prepared but never issued. Toronto Building staff advised that the CPs were not revoked as the conditions related to the construction had changed but were unable to provide any documentation to support that conditions had changed. In this case, above-grade CPs appears to have been issued based on false information provided by the applicant. As a result, the applicant was issued an above-grade CP and benefited from reduced DCs of \$400,000. As of July 2017, the project is still constructing below grade.

Revocation is the primary means of enforcing CP agreements

Toronto Building's main recourse for non-compliance with agreements is to revoke the CP. This is considered a serious step that Toronto Building is reluctant to use. This makes it even more important to only issue CPs where it is likely the permit applicant will be able to adhere to the terms of the CP agreement.

A set of enforcement guidelines is warranted

Regardless of the diligence that goes into the issue of CPs, it is likely there will be instances of non-compliance with agreements. In these cases enforcement guidelines are needed to ensure that appropriate action is taken for failing to comply with the terms of CP agreements.

Recommendation:

- 15. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement measures to enforce conditional permit agreements in a consistent manner.**

C.3. Parkland Levies and Education Development Charges Not Collected at the Time They Were Due

Parkland Levies

Park levies are due at the time the first above-grade permit is issued

S. 415-28 of the *Toronto Municipal Code* clearly mandates that the parkland levy should be paid "*prior to the issuance of the first above-grade building permit.*" The *Municipal Code* does not contain any provisions allowing for a variation from the timing of this payment. We noted two instances where CPs were issued before associated fees were fully collected.

Developers have been allowed to pay park levies after CPs are issued

In one instance, a CP agreement included a clause allowing a builder to pay the nearly \$314,000 park levy within "ten business days" of being advised of the amount payable with a condition that "*Failure to pay this fee may be grounds for revocation of permit.*" Toronto Building does not have the authority to include such a clause in the CP agreements.

The builder did not pay the park levy fee within ten business days of being advised of the amount payable. The fee was paid approximately six months later. We did not find any evidence that anyone in the Division detected the late payment of the fees until a newly assigned staff member reviewed the file on taking it over.

Further review revealed that it was a common practice in the Division to allow CP holders to pay the park levy after receiving the above-grade CP.

Municipal Code may need modification to allow for agreements to alter the timing of payment of parkland levies

Toronto Building management advised that they have difficulty complying with the *Municipal Code* provisions regarding the timing of the park levy payment. Toronto Building staff indicate it is not always possible to obtain a valuation of the land as of the day before the permit is issued. Any appraisal of the land is to be completed under the direction of the Director, Real Estate Services Division and it is not always possible to meet the required timing for the appraisal, primarily due to the flurry of last minute CP applications before a DC increase. This makes it difficult to comply with the *Municipal Code*.

In contrast, the *Municipal Code* provisions for DCs allow for a different timing of collection under an agreement between the permit applicant and the City. A similar provision may be necessary with respect to park levies.

Education Development Charges

There is a control built into the permit issuance system (IBMS) that prevents a CP from being issued unless all fees and charges are collected.

In one case, inaccurate data was input into the system to make it appear that no education development charges were due

For one site in the sample of projects we reviewed, (item I in Exhibit 1), we noted education development charges were made to appear in the system as if they were not applicable. This contravened the *Education Act*. Toronto Building staff entered inaccurate data into the system so it appeared that no education development charges were due in order to issue the associated above-grade CP. System data related to the project should not have been manipulated to facilitate the issuance of the CP just one day before a DC increase.

The education development charges payable was eventually adjusted in the system to what it should have been. The appropriate amounts owing were subsequently collected twelve days after the CP was issued.

Recommendations:

- 16. City Council request the Chief Building Official & Executive Director, Toronto Building Division to review, in consultation with the City Solicitor, the General Manager, Parks, Forestry & Recreation Division, and other appropriate City Divisions, the provisions of the *Municipal Code* related to the collection of Parkland Levies and propose any changes necessary.**
- 17. City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement appropriate controls to ensure IBMS data cannot be overridden without appropriate authorization.**

D. SCOPE LIMITATIONS

Scope of the review

This review was designed to confirm whether there was sufficient evidence to support claims that above-grade CPs issued were not in full compliance with section 8(3) of the *Building Code Act* and that there is a financial incentive for conditional permit applicants to obtain an above-grade CP in advance of the scheduled date of a DC increase. This was not an audit nor an assurance engagement.

CONCLUSION

Allegations substantiated

In our opinion, the allegation that some above-grade CPs issued were not in full compliance with section 8(3) of the *Building Code Act*, was substantiated for 2 of the 15 sites we reviewed, resulting in \$867,700 lost DC revenue.

Further, the allegation that there is a financial incentive for conditional permit (CP) applicants to obtain an above-grade CP in advance of the scheduled date of a DC increase is substantiated.

For 11 of 15 building sites examined, in our opinion, the related CPs were issued prematurely based on the Divisions draft CP criteria, resulting in an \$8 million loss of DC revenue. The appropriate DCs were collected based on the CP policy in effect at that time. On a go-forward basis we are recommending that the draft CP issuance criteria be reviewed and finalized to provide a standardized approach and some objective measures to support the Chief Building Official in forming her opinion regarding CP issuance.

We also noted evidence indicative of a culture to encourage the submission and expedited processing of CP applications to save developers DCs.

Controls can be improved to reduce risks

Our evaluation of the control system over the CP process revealed a need to strengthen due diligence in approving and monitoring CPs to ensure compliance with section 8(3) of the *Building Code Act* and relevant chapters of the *Municipal Code*. Control gaps, coupled with the Divisional culture, exposed the City to the risks of regulatory non-compliance and loss of DC revenue.

Report contains 17 recommendations

This report contains 17 recommendations along with management's response to each recommendation. Management agrees with our recommendations and has identified a plan to implement them. Management further agrees that there are concerns raised in this report that need to be addressed. The implementation of policies that set some objective criteria for the issuance of conditional permits, the equitable treatment of applicants and the strengthening of the monitoring and enforcement of conditional permit agreements will address these concerns.

Exhibit 1: Conditional Permits Issued Prematurely

	Date CP Issued	No. of Days Before a DC Rate Increase	Status of Above-Grade Construction	Other Key Information	Indicators that unreasonable delays in above-grade construction are unlikely			DC Revenue Reduction (in \$)
					Below-Grade Work Not Complete	CP Agreement Included Conditions Prohibiting Below-Grade Work	Above-Grade CPs Issued Before Demolition Permits	
A	Jan 29, 2015	3 days (Feb 1, 2015)	13 months later before excavation was complete		X	X	N/A	\$3,000,000
B	Jul 30, 2015	2 days (Aug 1, 2015)	16 months later, below-grade shoring was still in progress		X	X	CP issued 3.5 months before demolition permit	\$1,600,000
C	Jan 31, 2014	1 day (Feb 1, 2014)	31 months later, shoring and excavation was completed on 8/26/2016	CP agreement was renewed 6 times with virtual same set of conditions	X	N/A	CP issued 4 days before demolition permit	\$900,000
D	Jan 31, 2012	1 day (Feb 1, 2012)	6 months later, worked on P1 level	Lifting of holding symbol was not enacted at the CP issuance	X	N/A	N/A	\$500,000
E	Jan 27, 2014	5 days (Feb 1, 2014)	19 months later, worked on P1 level		X	N/A	N/A	\$500,000
F	Jan 30, 2013	2 days (Feb 1, 2013)	8 months later, worked on P1 level		X	N/A	N/A	\$400,000

	Date CP Issued	No. of Days Before a DC Rate Increase	Status of Above-Grade Construction	Other Key Information	Indicators that unreasonable delays in above-grade construction are unlikely			DC Revenue Reduction (in \$)
					Below-Grade Work Not Complete	CP Agreement Included Conditions Prohibiting Below-Grade Work	Above-Grade CPs Issued Before Demolition Permits	
G	Jul 31, 2015 & Jan 30, 2016	1 day (Aug 1, 2015) 2 days (Feb 1, 2016)	As of July 2017, no above-grade work has started	Outstanding zoning deficiencies Building Code review was not completed	X	X	N/A	\$400,000
H	Jan 30, 2015	1 day (Feb 1, 2015)	Almost one year later before excavation was complete	Management confirmed CP was issued to enable the CP holder to lock in lower DC rate	X	X	CP issued 11 days before demolition permit	\$300,000
I	Jan 29, 2016	3 days (Feb, 2016)	CPs were issued before the collection of DC	DC and EDC related issue	N/A	N/A	N/A	\$200,000
J	Jan 30, 2014	2 days (Feb 1, 2014)	6 months later, underground parking was only constructed to P2 level	Shoring CP was issued just two months earlier than the above-grade CP on 11/26/2013	X	N/A	N/A	\$200,000
K	Jul 31, 2014	1 day (Aug 1, 2014)	No construction activity for two years. The CP was subsequently revoked	CP agreement was renewed twice with virtually the same set of conditions (i.e. did not comply within specified timeframe twice)	X	X	CP issued 8.5 months before demolition permit	\$0 ¹
Total								<u>\$8,000,000</u>

¹Since the CP was revoked no DC loss is attributed here. Had the project continued, we estimate lost DCs of \$70,000, (one DC increase)

Exhibit 2: Applicable Law – Conditional Permits

Extract from Building Code 2006, Division C

1.3.1.5. Conditional Permits

(1) The chief building official shall not issue a conditional permit for any stage of construction under subsection 8(3) of the Act unless compliance with the following applicable laws has been achieved in respect of the proposed building or construction:

(a) regulations made by a conservation authority under clause 28(1)(c) of the Conservation Authorities Act with respect to permission of the authority for the construction of a building or structure if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development,

(b) section 5 of the Environmental Assessment Act with respect to the approval of the Minister or the Environmental Review Tribunal to proceed with an undertaking,

(c) subsection 24(3) of the Niagara Escarpment Planning and Development Act,

(d) subsection 27(3) of the Ontario Heritage Act,

(e) subsection 30(2) of the Ontario Heritage Act with respect to a consent of the council of a municipality to the alteration or demolition of a building where the council of the municipality has given a notice of intent to designate the building under subsection 29(3) of that Act,

(f) section 33 of the Ontario Heritage Act with respect to the consent of the council of a municipality for the alteration of property,

(g) section 34 of the Ontario Heritage Act with respect to the consent of the council of a municipality for the demolition of a building,

(h) section 34.5 of the Ontario Heritage Act with respect to the consent of the Minister to the alteration or demolition of a designated building,

(i) subsection 34.7(2) of the Ontario Heritage Act with respect to a consent of the Minister to the alteration or demolition of a building where the Minister has given a notice of intent to designate the building under section 34.6 of that Act, (j) by-laws made under section 40.1 of the Ontario Heritage Act,

(k) section 42 of the Ontario Heritage Act with respect to the permit given by the council of a municipality for the erection, alteration or demolition of a building.

(2) For the purposes of issuing a conditional permit under subsection 8(3) of the Act, a person is exempt from the requirement in clause 8(3)(a) of the Act of compliance with by-laws passed under sections 34 and 38 of the Planning Act where,

(a) a committee of adjustment has made a decision under section 45 of the Planning Act authorizing one or more minor variances from the provisions of any by-laws made under sections 34 and 38 of that Act,

(b) such minor variance or variances result in the achievement of full compliance with such by-laws, and

(c) no person informed the committee of adjustment of objections to the minor variances either in writing or in person at the hearing of the application.

(3) For the purposes of issuing a conditional permit under subsection 8(3) of the Act, a person is exempt from the requirement in clause 8(3)(a) of the Act of compliance with by-laws passed under sections 34 and 38 of the Planning Act where the construction in respect of which the conditional permit is issued is required in order to comply with an order issued under subsection 21(1) of the Fire Protection and Prevention Act, 1997 or under subsection 15.9(4) of the Act.

(4) A permit issued under subsection 8(3) of the Act shall indicate its conditional nature.

APPENDIX 1: Management's Response to the Auditor General's Report Entitled: "Toronto Building Division: Conditional Permits"

Recommendation 1: City Council request the Chief Building Official & Executive Director, Toronto Building Division to review and finalize draft conditional permit issuance criteria/guidelines.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Management agrees with this recommendation. Toronto Building will finalize and implement the Conditional Permit criteria/guidelines in Q2 2018.

Recommendation 2: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to strengthen controls to ensure that all requirements, including Zoning By-Law, *Building Code Act*, and Toronto Building conditional permit issuance criteria, are met prior to the issuance of a conditional permit.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

The draft conditional permit issuance criteria/guidelines are already in the process of review as part of the ongoing Conditional Permit Policy Review. The conditional Permit Policy review will be finalized and implemented in Q2 2018.

Recommendation 3: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement a quality assurance and compliance process to ensure conditional building permits issued meet regulatory and divisional requirements.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building will enhance the existing quality assurance processes for Plan Review by including a regular review of the issuance of conditional permits by Q4 2018.

Recommendation 4: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to amend the Conditional Permit Policy to require that all conditions relating to a conditional permit be included in the formal agreement supporting the conditional permit and ensure that staff adhere to this requirement.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Through the finalization of the Conditional Permit Policy, this issue will be addressed by Q2 2018.

Recommendation 5: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure that the impact of any development related demolition permits are considered prior to issuing a conditional permit.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

The CP policy will ensure the impact of any related demolition permits are considered prior to the issuance of the demolition permits, the policy will be finalized and implemented by Q2 2018.

Recommendation 6: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to amend the Conditional Permits Policy to:

- a. include requirements for the retention of appropriate documentation in support of decisions related to the issuance of Conditional Permits
- b. ensure management scrutiny and approval of significant deviations from policy and standard practice are documented
- c. include guidelines to assist staff in making assessments of claims of unreasonable delays in construction.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

The new Conditional Permit Policy will address steps taken to adequately document the assertions of unreasonable delay. The Policy will be finalized and implemented in Q2 2018.

Recommendation 7: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to document the steps taken to obtain reasonable assurance that Conditional Permit applicants' assertions of unreasonable delays in construction are valid before approving the conditional permit application.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

The above noted recommendations will be addressed as part of the new Conditional Permit Policy to be finalized and implemented in Q2 2018.

Recommendation 8: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to examine alternatives to mitigate the risks caused by the volume of conditional permit applications submitted immediately prior to a development charge increase.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building will examine the new Conditional Permit Policy, upcoming changes to the Development Charges Act, the End to End Review by the Chief Transformation Officer; and, the new Plan Review Quality Assurance program in order to explore opportunities to reduce these risks by Q4 2018.

Recommendation 9: City Council request the Chief Building Official & Executive Director, Toronto Building Division to periodically report to Council providing information as to timing of conditional permits relative to changes in development charges, extent, and impact of conditional permits issued.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

As set out in the current Conditional Permit Policy, Toronto Building notifies each Councillor prior to the issuance of each Conditional Permit. However Toronto Building can also provide an over-all report to Council on a periodic basis by Q4 2018.

Recommendation 10: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure building permit applicants are treated fairly and consistently by either:

- a. instructing staff to stop inviting conditional permit applications, or
- b. providing all applicants with building permit applications in process that will be subject to development charges with information regarding applying for a conditional permit prior to a development charge increase.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building views the current practice of notifying building permit applicants of any regulatory changes that could impact their permit application as good customer Service. In order to ensure that applicants are treated fairly and consistently, Toronto Building will explore opportunities to notify all applicants impacted by development charges by Q4 2018.

Recommendation 11: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure performance planning objectives for individual employees contribute to the overall efficiency and regulatory compliance of the City.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

This recommendation will be implemented by Q1 2018.

Recommendation 12: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to ensure staff are aware and trained in appropriate divisional objectives that should guide their day-to-day activities and decisions.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

It is standard practice for Toronto Building to train staff on all new and revised policies. Staff will be trained on the new Conditional Permit Policy in Q2 2018.

Recommendation 13: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to review permit monitoring and enforcement practices and undertake any changes necessary to adequately monitor Conditional Permits.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building will review permit monitoring and enforcement practices in their review of the Conditional Permit Policy and make any changes necessary to the policy to adequately monitor Conditional Permits. The Policy will be finalized in Q2 2018.

Recommendation 14: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to explore opportunities to enhance the use of technology in the inspection process in an effort to gain both efficiency and effectiveness.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building continuously explores opportunities to improve efficiency through the use of technology. Toronto Building is currently developing an Information Technology Roadmap to inform future technological opportunities to support and enhance service delivery. Q1 2019.

Recommendation 15: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement measures to enforce conditional permit agreements in a consistent manner.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

The enforcement of Conditional Permit Agreements will be addressed in the new Conditional Permit Policy by Q2 2018.

Recommendation 16: City Council request the Chief Building Official & Executive Director, Toronto Building Division to review, in consultation with the City Solicitor, the General Manager, Parks, Forestry & Recreation Division, and other appropriate City Divisions, the provisions of the *Municipal Code* related to the collection of Parkland Levies and propose any changes necessary.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building will review the Municipal Code related to the collection of parkland levies and if necessary propose changes to the Municipal Code to Parks for their consideration by Q3 2018.

Recommendation 17: City Council request the Chief Building Official & Executive Director, Toronto Building Division, to implement appropriate controls to ensure IBMS data cannot be overridden without appropriate authorization.

Management Response: Agree Disagree

Comments/Action Plan/Time Frame:

Toronto Building will implement appropriate controls in IBMS by Q4 2018.
